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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 784

SUPERIOR TANNING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

LEWIS F. JACOBSON,
DAVID SILBERT,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioner, Superior Tanning Company, respectfully petitions this Honorable Court for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Seventh Circuit enforcing an order of the National Labor Relations Board.

Summary Statement of the Matter Involved.

The decree and opinion involve the question of the constitutional right of an employer to enter into individual contracts with his employees if the terms of such individual contracts do not deprive the employees of their rights to collective bargaining or self organization. The decree denies petitioner such right in perpetuity.

The decree requires that petitioner

> "cease and desist from: * * * (c) Giving effect to the individual contracts of employment[1] in the form noted in the Board's finding of fact or to *any modification, continuation, extension or renewal thereof or to any similar form of contract for any period subsequent to December 31, 1938.*"

It is not clear from the Court's opinion whether the Court is basing its sanction of this perpetual injunction against the constitutional right of freedom of contract upon: (a) The Court's opinion of the invalidity of the "adjustment" clause of the individual contract, or, (b) upon the Court's conclusion that assuming the terms of the individual contract are valid, nevertheless, Section 7 of the National Labor Relations Act gives the National Labor Relations Board the jurisdiction and power to declare such an individual contract illegal and void and to perpetually enjoin any individual contract, if the Board finds that a speech of the employer expressing his opinion, at the time of the offer and execution of the individual contract, influenced the employees to sign an individual contract, or, (c) upon the Court's conclusion of law that any individual contract is prohibited by the Act if the individual contract indirectly interferes with an organizational campaign of a labor union.

There is no finding by the Court or the Board that anything said in the speech was untrue or that the employees were threatened with economic reprisals. The sole complaint was that the speech evidenced to the employees petitioner's opinion of labor organizations and petitioner's

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[1]An exact copy of the individual contract involved and a concise statement of the factual background behind the execution and operation of the individual contract appears at pages 8 to 12 of the supporting Brief hereto.

"aversion to unionization," (although it included statements to the employees that they would *not* lose their jobs if they joined a union; they were free to do anything they wanted to do; and they could sign or not sign an individual contract as they chose).

The Decree of the Circuit Court of Appeals sanctions such perpetual injunction, prohibiting any individual labor contract now or ten years hence no matter what might be the circumstances, even though the speech and alleged "coercive" conduct occurred more than three and a half years prior to the decree of the Circuit Court of Appeals, and the record fails to disclose any evidence regarding action of petitioner or its employees subsequent to February, 1938. The record does disclose that the 1937 individual contract complained of expired by its terms on December 31, 1937, and the 1938 individual contract expired by its terms on December 31, 1938.

The Court refused to distinguish between an individual contract and collective bargaining contracts. In this case the undisputed facts are: there was never any demand or refusal on the part of the petitioner to collectively bargain with any union, at any time; the majority of petitioner's employees never belonged to any labor organization; petitioner at no time ever attempted to offer any of its individual contracts of employment as a bar to collective bargaining with any collective bargaining agency; employees of petitioner had both their individual contract of employment and membership in the complaining Union at the same time without any interference.

Basis of Jurisdiction of This Court.

The jurisdiction of this Court is invoked under: (a) Sections 239 and 240 of the Judicial Code as amended on February 13, 1925, (U. S. C., Title 28, Secs. 346 and 347); (b) Sec. 10-e of the National Labor Relations Act (49 Stat.

449) and (c) the decree of the Circuit Court of Appeals sought to be reversed was entered on January 21, 1941.

The Questions Presented.

(1) Do the words of Sections 7 and 8(1) of the National Labor Relations Act,

> "It shall be an unfair labor practice for an employer (a) to interfere with, restrain or coerce employees in the rights * * * ('to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.')"

(a) Give the National Labor Relations Board jurisdiction over written individual contracts, notwithstanding that the terms of such contracts do not deprive the employees of any of their rights to collective bargaining or self organization. (The Circuit Court of Appeals so held);

(b) Give the National Labor Relations Board any jurisdiction or power to prohibit an employer in perpetuity from entering into individual contracts to take effect *in futuro* (The Circuit Court of Appeals so held);

(c) Prohibit an arbitration clause limited to adjustment of disputes arising under the individual contract (the Circuit Court of Appeals so held);

(d) Prohibit an employer when there is no collective bargaining agency representing a majority of his employees, to enter into written individual employment contracts whose terms do not deprive any employees of any rights under the Act (the Circuit Court of Appeals so held);

2. Does such a construction of the language of Sections 7 and 8(1) of the Act, by the Circuit Court of Appeals for the Seventh Circuit, violate the First and Fourteenth Amendments of the Constitution of the United States?

3. Is it an unfair labor practice for an employer, during a period of national labor upheavals and contagion of sitdown strikes, often of unknown origin, to exercise his constitutional right to express his opinion in a speech to his employees on the subject of labor relations where no contention is made that any statements of the employer were untrue and no threats of economic reprisal accompanied or followed the speech?

4. Does the fact that a labor organization is conducting an organizational campaign among employees vitiate the employer's constitutional rights of freedom of speech and freedom of individual contract?

Reasons for the Allowance of the Writ.

(1) This Court has never directly passed upon the Constitutional question of the right of an employer to enter into written individual employment contracts with employees where the employer is not contaminated by any company dominated union or refusal to bargain collectively.

(2) The decree of the Circuit Court of Appeals, in this case, perpetually prohibiting the right of individual contract, is in conflict with the decisions of this Court in the cases of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45; *Schneider* v. *State*, 308 U. S. 147; *Near* v. *State of Minnesota*, 283 U. S. 697, 714; *Patterson* v. *Colorado*, 205 U. S. 456, 462; and is in conflict with the following cases of other Circuit Courts of Appeals; *National Labor Relations Board* v. *Sterling Electric Motors, Inc.*, 109 F. (2d) 194 (C. C. A. 9); *P. & O. Steamship Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5); *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 90 F. (2d) 520 (C. C. A. 3) Cert. Den. 302 U. S. 738, and *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 164 (C. C. A. 9).

(3) The decree of the Circuit Court of Appeals misinterprets the decision of this Court in the case of *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, and is in direct conflict with the interpretation of the *National Licorice* case given by the Ninth Circuit in the case of *National Labor Relations Board* v. *Sterling Electric Motors, Inc.,* 112 F. (2d) 63, 68 (C. C. A. 9) which held that this Court struck down the individual contracts in the *National Licorice* case because "on their face" they showed agreements in violation of the Act.

(4) The Circuit Court of Appeals, in refusing to distinguish between individual contracts and collective bargaining contracts negotiated with a company dominated union and asserted as a bar to undominated collective bargaining, has not given proper effect to the decisions of this Court in the case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, and denies an employer his right guaranteed by the First and Fourteenth amendments to the Constitution of the United States.

(5) The opinion of the Circuit Court of Appeals in this case, striking down individual contracts because of a speech made to the employees and thereby in effect denying petitioner its constitutional right of freedom of speech and expression of opinion, is in direct conflict with the reasoning of this Court in the cases of *Thornhill* v. *Alabama,* 310 U. S. 88; *Carlson* v. *California,* 310 U. S. 106; *Cantwell* v. *State of Connecticut,* 310 U. S. 296; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* decided February 10, 1941, and *American Federation of Labor* v. *Swing,* decided February 10, 1941; and is in direct conflict with the decisions of other Circuit Courts of Appeals; *National Labor Relations Board* v. *Ford Motor Co.,* 114 F. (2d) 905 (C. C. A. 6); *Midland Steel Products Co.* v. *National Labor Relations Board,* 113 F. (2d) 800 (C. C. A. 6); *National Labor*

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(6) The effect of the Court's opinion is to limit the right of free speech. It raises for the first time, in sharp relief, the extent, if any, to which the constitutional guaranty of freedom of speech and freedom of contract was and could be impaired by Congress and the National Labor Relations Act. A clear-cut decision on the proper construction of the meaning of the words, "interfere, restrain or coerce," used in Section 8(1) of the Act, with reference to the constitutional right of freedom of contract and speech, is of vital national importance to the entire country, as well as all employees, employers, and labor organizations. This is especially true during these times requiring the effective operation of the country's national defense program. If the opinion of the Circuit Court of Appeals for the Seventh Circuit is allowed to stand unchallenged by this Court, the constitutional right of freedom of speech and freedom of contract is left in a maze of hopeless confusion and chaos, which this Court can and should avoid by the exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Court to review the decree of the Circuit Court of Appeals for the Seventh Circuit and that the decree be reversed.

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